No. 97-1221

(2)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

BRUCE RING,
Petitioner,

v.

FEDERAL NATIONAL MORTGAGE ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

OPPOSITION OF FEDERAL NATIONAL MORTGAGE ASSOCIATION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. DID THE EIGHTH CIRCUIT CORRECTLY AFFIRM SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS ON PLAINTIFF BORROWER'S CLAIM UNDER THE FAIR HOUSING ACT, 42 U.S.C. § 3601 *ET. SEQ.*, WHEN THE RECORD CONCLUSIVELY ESTABLISHED THAT PLAINTIFF REPEATEDLY FAILED AND REFUSED TO FILE A COMPLETED LOAN APPLICATION, INCLUDING NECESSARY FINANCIAL AND OPERATING DATA?

II. IS A PLAINTIFF BORROWER ALLEGING DISCRIMINATION UNDER THE FAIR HOUSING ACT, 42 U.S.C. § 3601, *ET SEQ.*, BARRED FROM RELYING ON THE "FUTILITY" DOCTRINE TO ELIMINATE HIS BURDEN OF PROVING THAT HE APPLIED FOR A LOAN, WHEN THE UNDISPUTED FACTS SHOW THAT (1) PLAINTIFF KNEW HIS PRELIMINARY SUBMISSION WAS NOT AN APPLICATION; (2) PLAINTIFF HAD SOUGHT AND BEEN AFFORDED SEVERAL OPPORTUNITIES TO FILE A COMPLETED APPLICATION CONTAINING NECESSARY FINANCIAL AND OPERATING DATA; AND (3) PLAINTIFF NEVERTHELESS REPEATEDLY FAILED AND REFUSED TO SUBMIT AN APPLICATION?

LIST OF PARTIES AND AFFILIATES

Plaintiff Bruce Ring, an individual

Defendant Federal National Mortgage Association. There is no parent company or subsidiary.

Defendant First Interstate Mortgage Association

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

In his attempt to manufacture an issue appropriate for the Court's exercise of discretionary review, Petitioner Bruce Ring ("Ring") misstates or ignores the record in this case and mischaracterizes the holding in the unpublished opinion by the United States Court of Appeals for the Eighth Circuit.

Contrary to the statement in Ring's Petition, the Eighth Circuit's opinion does not hold, expressly or by implication, "that a borrower cannot pursue a claim for racial discrimination under the Fair Housing Act [42 U.S.C. § 3601 *et seq.*] as a matter of law if his or her loan application is not typed or printed on the form available from the lender." Ring Petition ("Pet.") at 1. Rather, the Eighth Circuit's opinion merely reflects the unique, undisputed facts of this case. They establish both (1) that Ring failed to submit an application, despite repeated opportunities to do so, and (2) that Ring did not and could not have reasonably believed such an application would have been "futile" because of any alleged discriminatory practice of defendant Federal National Mortgage Association ("Fannie Mae"). The Eighth Circuit's opinion does not conflict with any decisions of this Court or other courts of appeals regarding the elements of a *prima facie* case of discrimination or the application of a "futility" doctrine in Fair Housing Act cases. Moreover, the unique — and undisputed — facts of this case do not present any legal issue of general applicability that requires clarification by this Court.

Ring's Initial Contact with First Interstate.

In August, 1989, Mr. Ring owned seven multifamily apartment buildings on non-contiguous pieces of property in the St. Louis, Missouri, area (the "Seven Properties"). Fannie Mae's Eighth Circuit Appendix ("FNMA App.") at 132-133. At that

time, Mercantile Bank in St. Louis held individual first deeds of trust on each of the Seven Properties. FNMA App. at 191, 348-368.

In August, 1989, Ring contacted defendant First Interstate Mortgage Company ("First Interstate"), a mortgage broker, about refinancing his existing mortgage loans on the Seven Properties. FNMA App. at 191, 332-337, 455, 474-475. Defendant First Interstate had relationships with a variety of real estate lenders.

First Interstate also had a relationship with Fannie Mae pursuant to which Fannie Mae purchased in the secondary market loans made by approved lenders.[1] FNMA App. at 191, 290-292, 294-297, 330-331. At that time, Fannie Mae had two primary types of multifamily programs under which it purchased eligible mortgages securing loans made by authorized originating lenders. Under the Delegated Underwriting and Servicing Program ("DUS"), authorized lenders were delegated the authority to make eligible loans that satisfied certain criteria relating to size and loan-to-value ratios and could then put them to Fannie Mae for purchase. Under the Prior Approval Program, Fannie Mae had to provide prior approval of a loan for the lender to be assured it would be purchased by Fannie Mae. FNMA App. at 191, 195, 292-293, 667, 671; Ring's Eighth Circuit Appendix, Tab 5 ("App. 5"), pp. 71, 72, 84, 203. Contrary to Mr. Ring's statement in his Petition, in August, 1989, First Interstate was authorized to originate and sell mortgages to Fannie Mae only under the DUS program, *not* under the Prior Approval Program. FNMA App. at 191, 290-291.

Under the DUS program, First Interstate could make a DUS loan only if it met the DUS guidelines. Those guidelines, among

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[1] Fannie Mae, a privately-owned, government-chartered corporation, provides a secondary market for primary lenders, such as First Interstate, which could seek to sell qualified loans to Fannie Mae.

other things, contained requirements regarding maximum loan-to-value ratios, minimum loan amounts, occupancy rates, debt service coverage ratios, and limitations on commercial space. FNMA App. at 715-718, 871, 906-908. Under the guidelines, Fannie Mae was obligated to buy a mortgage loan from First Interstate only if it met certain loan-to-value ratio standards and had a value of at least $1,000,000. FNMA App. at 191, 290, 292, 293, 303-304, 715-718. Individual loan amounts for properties of less than $1,000,000 could be aggregated to reach the $1,000,000 threshold, but only if the properties were contiguous. FNMA App. at 191, 290, 292, 293, 303-304.

In August, 1989, Ring met with Kenneth Green ("Green"), Assistant Vice President of First Interstate. FNMA App. at 191, 455, 474-478. Ring inquired about loans totaling in excess of $3.6 million, which would provide sufficient capital to pay off the existing loans on the Seven Properties and cover the cost of obtaining a new loan. FNMA App. at 191, 455, 491, 493-494, 508-509, 525. Six of Ring's Seven Properties involved loans of less than $1 Million. As noted, none of Ring's properties were contiguous. Ring has admitted he was seeking to refinance all Seven Properties and was not interested in refinancing only some of them. FNMA App. at 191, 455, 491, 503-504, 508-509, 514-516.

Ring provided Green with only limited information about the Seven Properties. This included seven one-page "pro-formas" which contained only financial projections (not actual operating numbers) for each property; the amount of the loan requested for each property; a credit report for Ring and his wife; and an unaudited financial statement that Ring had prepared. FNMA App. at 191, 455, 481-483, 485-490.

Ring admitted that he knew that, if he decided to pursue a loan, he would need to provide additional information. *According to Ring*, Green told Ring that First Interstate would need additional

information that Ring had not supplied but was required for a complete application for submission to Fannie Mae. The additional information included such crucial documents as property appraisals, additional credit reports, engineering reports, and tax returns. FNMA App. at 191, 455, 497-499, 507, 525.

First Interstate's Contacts With Fannie Mae.

After meeting with Ring, Green contacted Joseph Marsh ("Marsh"), an underwriter at Fannie Mae's Dallas office. Green told Marsh that he had a prospective borrower with seven properties, none of which qualified for a DUS loan; that three of the properties had too much commercial space to qualify under Fannie Mae's guidelines; and that he had forewarned Ring that the properties would need to be packaged in some way to be considered. According to Green, Marsh responded that Green could send whatever materials he had, and that Marsh, as a courtesy, would take a preliminary look at them and offer his comments. App. 5, Green Dep. pp. 103-105, 108-109, 112; App. 16, Marsh Dep. pp. 46-48.

Green subsequently forwarded the one-page pro-formas and photographs of the properties to Marsh along with a cover letter transmitting the "preliminary package" of materials to Marsh. Green also sent a copy of the cover letter to Ring. FNMA App. at 191, 261-262, 290, 320. Green testified that he intended this cover letter to communicate his views of the business soundness of the loans. FNMA App. at 191, 290, 313, 317-319, 329.

Marsh asked his supervisor, Gene Glaser ("Glaser"), who was going to St. Louis on other business, to go by a few of the properties if Glaser had time. App. 16, Green Dep. pp. 40-42, 43, 51-52. Marsh also gave Glaser the preliminary materials and cover letter received from Green. FNMA App. at 191, 379-380A. While in St. Louis, Glaser had time to go by three of the properties. Upon his return to Dallas, Glaser told Marsh that his impression was that the purported expenses for operating the

properties appeared unrealistically low and that the loan amounts requested on the pro-forma sheets appeared aggressively high. FNMA App. at 191, 284, 286-289.

Because Marsh was preparing to leave his office on business, he gave his secretary, Ms. Webb, the materials Green had sent and told her to prepare a transmittal letter to Green and sign his name. FNMA App. at 191, 263, 379, 381-382, 566-586; App. 8. Ms. Webb testified without contradiction that she personally composed the letter without input or approval from Mr. Marsh, who never saw the letter until much later, after Ring complained to former United States Senator John Danforth. FNMA App. at 191, 566-586; App. 16, Marsh Dep. pp. 72-73, 77-78. The letter stated "we are unable to accept your request for a loan application" and "[w]e are returning your preliminary package." Petitioner's Appendix ("Pet. Apdx.") at C-67.

Upon receipt of the preliminary materials returned from Marsh, Green returned the materials to Ring, along with a copy of Green's letter to Marsh and Marsh's secretary's transmittal letter. Ring acknowledged that, after receiving a copy of the letter, he never attempted to call Marsh or anyone at Fannie Mae to discuss Fannie Mae's position. Instead, the "first thing" he did was to see an attorney. FNMA App. at 191, 455, 502-506.

Ring's Multiple Opportunities and Repeated Failures or Refusals To Apply For Fannie Mae Financing.

First Opportunity. In October, 1989, following his discussions with Green of First Interstate, Ring began to contact various members of Congress seeking their assistance in securing an opportunity to submit an application for Fannie Mae multifamily financing. FNMA App. at 191, 455, 510-512. On October 12, 1989, Ring wrote to Senator Danforth. On November 7, 1989, Senator Danforth wrote to Fannie Mae, enclosing a copy of Ring's October 12, 1989, letter. On December 4, 1989, Fannie Mae responded to Senator Danforth, who forwarded a

copy of the letter to Ring. Pet. Apdx. at C-68; FNMA App. at 191, 211-216, 455, 512. Fannie Mae expressly stated in its December 4, 1989, letter to Senator Danforth that Fannie Mae stood ready to review "a complete application proposal on a specific property that meets appropriate standards and financial criteria." Pet. Apdx. at C-71; FNMA App. at 191, 214-216.

After Ring received Fannie Mae's December 4, 1989, letter, Green of First Interstate called him and asked him to submit an application for a loan on some of the properties. FNMA App. at 191, 290, 325-326. Ring testified that he responded by telling Green that if he could not apply on all the properties, he would not apply at all. FNMA App. at 191, 455, 514-516.

After Ring's discussion with Green, Ring still did not submit an application on *any* of the properties. Rather, Ring again asked Senator Danforth's office for assistance. App. 13; FNMA App. at 191, 455, 514-516.

Second Opportunity. On January 4, 1990, Senator Danforth sent a second letter to Fannie Mae, enclosing a second letter, dated December 27, 1989, he had received from Ring. On January 23, 1990, Fannie Mae responded to Senator Danforth's January 4, 1990, letter. Fannie Mae's January 23, 1990, letter to Senator Danforth stated in pertinent part:

> As an investor rather than a lender, Fannie Mae does not solicit business from developers nor deal directly with borrowers/developers. Rather, we review applications which lenders submit to us as recommended for investment and in conformance with our underwriting guidelines . . . . *[O]ur regional staff stands ready to review a completed application proposal on a specific property that meets appropriate physical standards and financial criteria*. . . . We regret that we cannot proceed without a formal application . . . . If Mr. Ring would like to discuss this, he should contact Joe Marsh, Investment Officer (214/770-7592) or

> Gene Glaser, Senior Investment Officer, (214/770-7583) in our Dallas office.

Fannie Mae Appendix to this Opposition at A-1, 2 (emphasis added).

Even after receiving a copy of Fannie Mae's January 23, 1990, letter from Senator Danforth's office, Ring *still* did not submit an application to Fannie Mae on any of the Seven Properties. Nor did he contact either Marsh or Glaser. FNMA App. at 191, 217-223, 455, 517-520.

Thus, it is undisputed that, as of March of 1990, neither First Interstate nor Ring had submitted to Fannie Mae a complete application containing basic necessary financial and operating information regarding the Seven Properties. FNMA App. at 107, 191, 217-218, 455, 513-514, 1061, 1077-1078.[2] Ring failed to apply despite his knowledge that, in its two letters to Senator Danforth, Fannie Mae had expressly offered Ring two opportunities to apply for financing under a Fannie Mae-sponsored program. FNMA App. at 191, 455, 532-533.

Ring Seeks Judicial Relief Allowing Him To Submit An Application, And Then Fails To Comply With A Court Order Directing Him To Submit An Application.

On March 1, 1990, Ring sued both First Interstate and Fannie Mae in the Circuit Court for the City of St. Louis. FNMA App. at 28. Ring's petition, captioned "Application for Temporary and Permanent Injunction" (the "original complaint"), alleged violations of various federal statutes and regulations. In Count

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[2] FNMA Form 1053, lodged by Ring with his petition, required the submission of certified income and expense statements and balance sheets for the current and prior two years, detailed rental information, and personal financial statements. As noted, other guidelines required, among other things, appraisals and engineering and architectural reports. FNMA App. at 722-723. None of those items were submitted by Ring.

I of his original complaint, Ring asked the court to order Fannie Mae to accept an application from Ring and consider the purchase of loans in accordance with Fannie Mae internal guidelines and applicable statute and regulations. *Id.* Upon application of both defendants, the case was removed to the United States District Court for the Eastern District of Missouri. Fannie Mae and First Interstate each moved to dismiss. FNMA App. at 2. On April 30, 1990, following a conference with the parties, Judge Cahill ordered that a ruling on the motions would be stayed until Ring had an opportunity to amend his complaint.

On May 31, 1990, Ring filed his Amended Complaint, seeking both damages and injunctive relief. FNMA App. at 61. In his Amended Complaint, Ring specifically asked the court to order Fannie Mae and First Interstate "to permit Bruce Ring to submit an application for financing of the above-described properties and review the properties submitted by Bruce Ring, pursuant to Federal statutes and regulations and the internal lending guidelines of Fannie Mae." He further asked the court to order Fannie Mae "to accept such application for consideration and consider the purchase of such mortgages in conformity with the statutes and regulations governing the Federal National Mortgage Association and their internal guidelines." FNMA App. at 61, 69. Fannie Mae and First Interstate each moved for dismissal of plaintiff's Amended Complaint. FNMA App. at 2.

Third Opportunity. Two months later, in August of 1990, Judge Cahill held another status conference. At the conference, with Ring present, Judge Cahill issued an Order staying the proceedings for 90 days, ordering Ring to submit applications to Fannie Mae for loans on each of the properties for which he sought refinancing, and ordering Fannie Mae to submit "a written evaluation in response to plaintiff's applications within 30 days of the receipt of plaintiff's applications." Fannie Mae Appendix to this Opposition at A-3; FNMA App. at 191, 224, 455, 526.

Notwithstanding the district court's Order, Ring *still* did not submit an application. FNMA App. at 191, 455, 526.

Fourth Opportunity. At a subsequent status conference about thirty days later, Judge Cahill asked Ring why he had not applied for a Fannie Mae loan. Ring did not claim that he had failed to file because he felt that it would be futile as a result of any alleged discriminatory policies of Fannie Mae. Rather, Ring asserted that his finances had changed and he could not afford to apply. FNMA App. at 191, 455, 526-531, 533-534. Ring told Judge Cahill he had obtained a Fannie Mae application from First Interstate's attorney and that he believed $177,500 would be necessary to fund the application process. FNMA App. at 191, 455, 541-545. Of the $177,500, $14,000 was for application fees. FNMA App. at 871, 909.

Ring's explanation that he could not afford to file an application was inconsistent with a financial statement Ring had filed with the court with his Motion for Equitable Relief, showing his alleged net worth as approximately $4,000,000. FNMA App. at 94, 191, 455, 529-531, 871, 909-913. Moreover, as Ring also acknowledged, $72,000 of the $177,500 represented one-half of the "points" on the loans, and would be refundable at the closing. FNMA App. at 191, 455, 534-545, 871, 909. The remaining $91,500 consisted of the balance of the "points," $10,500 for engineering reports and $23,000 for appraisal fees. FNMA App. at 191, 455, 534-545, 871, 909.

Notwithstanding Ring's admitted net worth of $4 million, Fannie Mae demonstrated its good faith by offering to waive its $14,000 in application fees. FNMA App. at 191, 455, 527, 541-545, 871, 909.

Yet, despite that fee waiver by Fannie Mae, despite the fact that the district court had ordered the relief Ring sought, and despite the facts that a significant portion of the fees would be refundable and that Ring alleged his net worth was $4 million,

Ring *still* did not apply for a loan after the third status conference with Judge Cahill.

Dismissal Of Ring's Amended Complaint, Ring's Appeal To The Eighth Circuit, And Ring's Subsequent Attempt to Change Forums.

Following Ring's repeated failures to comply with Judge Cahill's orders that Ring submit an application for financing, the case was transferred to Judge Jean Hamilton of the Eastern District of Missouri. The defendants then resubmitted their motions to dismiss or for summary judgment. On March 29, 1991, Judge Hamilton dismissed with prejudice Ring's claims brought pursuant to 15 U.S.C. § 1691, *et seq.* (Equal Credit Opportunity Act), 42 U.S.C. § 2000(d), *et seq.* (Title VI of the Civil Rights Act), and 12 U.S.C. § 1716, *et seq.* (National Housing Act), and the regulations issued thereunder, 24 C.F.R. §§ 81.16-18. Judge Hamilton also ordered Ring to file a third version of his complaint, more clearly setting forth his claim under 42 U.S.C. § 3605 (Fair Housing Act). FNMA App. at 107. On April 25, 1991, pursuant to Judge Hamilton's March 29 Order, Ring filed a third version of his complaint, alleging only a disparate treatment claim based on 42 U.S.C. § 3601, *et seq.* App. 32.

On October 29, 1991, pursuant to motions to dismiss and for summary judgment filed by defendants, Judge Hamilton dismissed plaintiff's case on the ground that Ring had failed to plead a cause of action under 42 U.S.C. § 3605, *et seq.* FNMA App. at 117. Ring appealed to the United States Court of Appeals for the Eighth Circuit.

The Eighth Circuit reversed in part the judgment of the district court. *Ring v. First Interstate Mortgage, Inc.*, 984 F.2d 924 (8th Cir. 1993)("*Ring I*"). The Eighth Circuit held that, under liberal pleading standards, Ring's second amended complaint had been

sufficient to state a claim under the Fair Housing Act. The court remanded the case to Judge Hamilton.

Apparently searching for what he thought might be a more favorable district court forum, Ring responded to the Eighth Circuit's remand order by voluntarily dismissing the lawsuit in August of 1993, and refiling his complaint in the District Court for the District of Columbia. FNMA App. at 1, 8-9, 122, 123. On October 28, 1993, that court granted Fannie Mae's motion to transfer the case to the Eastern District of Missouri, where the case was reassigned to Judge Hamilton.

Fannie Mae's Summary Judgment Motion.

On January 22, 1996, Fannie Mae moved for summary judgment, arguing that Ring could not make a *prima facie* case of discrimination under the Fair Housing Act. FNMA App. at 191. Fannie Mae presented six bases for summary judgment: (1) Ring was not a member of a protected class; (2) Ring had never applied for financing from Fannie Mae; (3) Ring was not qualified for the Fannie Mae financing he claimed to be seeking; (4) Fannie Mae had never rejected a loan application from Ring; (5) no similarly situated borrowers received financing from Fannie Mae; and (6) Ring could not establish any damages as a result of defendants' conduct. *Id.* On April 29, 1996, Judge Hamilton granted Fannie Mae's motion for summary judgment. Judge Hamilton held that Ring could not make a *prima facie* case because he did not qualify for a Fannie Mae loan of the type and amount he was allegedly seeking. FNMA App. at 945. Based on evidence developed in discovery and presented in Fannie Mae's motion, Judge Hamilton held that the loan-to-value ratio of the loans Ring was allegedly seeking substantially exceeded Fannie Mae established guidelines and, therefore, he did not qualify for

Fannie Mae financing.[3] Judge Hamilton did not reach the issue of Ring's failure to apply for financing.

Mr. Ring appealed the district court's judgment to the United States Court of Appeals for the Eighth Circuit. On September 5, 1997, in an unpublished *per curiam* opinion ("*Ring II*"), the panel of Chief Judge Richard Arnold, Judge Roger Wollman, and visiting Judge Robert Beezer affirmed the district court's grant of summary judgment, "because Ring failed to submit an application for a loan." Pet. Apdx. at A-2. Based on this holding, the Eighth Circuit did not review Judge Hamilton's conclusion that Ring did not qualify for the loans he was allegedly seeking.

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[3] Based on the testimony of Ring's own witnesses, Judge Hamilton found that the loan-to-value ratios on each of Ring's properties exceeded 85%, and that, in fact, the average loan-to-value ratio on the Seven Properties was 100%. Ring's own expert witness testified that a maximum loan-to-value ratio of 70-80% was standard in the industry. FNMA App. at 332, 338, 341, 345-47. Consistent with the industry standard, Fannie Mae's guidelines provided for an acceptable loan-to-value ratio of 80%. FNMA App. at 715-718. Thus, Ring's properties failed to meet Fannie Mae underwriting guidelines.

REASONS FOR DENYING THE WRIT

In framing both of his questions presented for review, Ring distorts and expands the Eighth Circuit's holding, in an apparent attempt to suggest a conflict with decisions from other courts and to create an issue of sufficient breadth or importance to justify certiorari. There is no conflict and there is no important issue presented by this case.

Contrary to Ring's assertion, the Eighth Circuit did not hold that a *prima facie* claim of discrimination under the Fair Housing Act required proof that Ring submitted a loan application on a specific form "created by Fannie Mae." Pet. at 12. Rather, the Eighth Circuit's *per curiam* opinion reflects the court's conclusion that the facts of this case — including Ring's repeated failures to submit an application, or even basic financial information routinely required for loans — establish that Ring abjectly failed to satisfy the application requirement of a *prima facie* case. Ring's suggestion that his preliminary materials were complete except for the lack of a particular form is flatly contradicted by the undisputed record.

There is similarly no merit to Ring's related contention that the Eighth Circuit erred in failing to apply the "futility" doctrine to relieve him of the obligation of filing an application. In light of the undisputed facts, no reasonable person could have believed that it would have been "futile" for Ring to file an application. To the contrary, Fannie Mae's express solicitations of an application in its letters to Senator Danforth, the district court's orders directing Ring to file an application and directing defendants to evaluate it, and Fannie Mae's offer to waive its application fees, all indicate that if Ring had applied, his application would have been considered in good faith.

In short, the Eighth Circuit's *per curiam* decision presents no issue warranting review by this Court. The legal principles the Eighth Circuit applied to the facts of this case are entirely

consistent with those recognized by this Court and other federal circuit courts that have considered the elements of a *prima facie* case under the Fair Housing Act and the related "futility" doctrine.

I. THE EIGHTH CIRCUIT PROPERLY AFFIRMED SUMMARY JUDGMENT AGAINST RING ON HIS FAIR HOUSING ACT CLAIM, BECAUSE THE UNDISPUTED FACTS ESTABLISHED THAT RING FAILED TO SATISFY THE APPLICATION REQUIREMENT OF A *PRIMA FACIE* CASE.

In *Ring v. First Interstate Mortgage, Inc.*, 984 F.2d 924 (8th Cir. 1993) ("*Ring I*"), the Eighth Circuit applied by analogy the elements of a Title VII *prima facie* case of discrimination, as set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), to Ring's claim of discrimination under the Fair Housing Act. Under that analysis, a plaintiff alleging discrimination under the Fair Housing Act must prove: (1) that he was a member of a protected class; (2) that he applied for and qualified for a loan from defendants; (3) that the loan was rejected despite his qualifications; and (4) that defendants continued to approve loans for applicants with qualifications similar to those of plaintiff. *Ring I*, 984 F.2d at 926, citing *Secretary, U.S. Dept. of Housing and Urban Development, on behalf of Herron v. Blackwell*, 908 F.2d 864, 870 (11th Cir. 1990), and *Selden Apts. v. U.S. Dept. of Housing and Urban Development*, 785 F.2d 152, 159 (6th Cir. 1986).

Ring acknowledges that in *Ring I* the Eighth Circuit properly identified the elements of a *prima facie* case of discrimination

under the Fair Housing Act. Pet. at 12-13.[4] Thus, the issue presented in Ring's petition to this Court is simply whether the Eighth Circuit in *Ring II* misapplied those requirements to the facts of this case. It did not.

Ring had the burden of establishing that he submitted an application for Fannie Mae financing. *Ring I*, 984 F.2d at 926. He failed to meet that burden. It is undisputed that Ring never filed a completed application for a Fannie Mae approved loan and *knew* he failed to do so. Ring has admitted that he knew that additional materials were required for an application to be considered — including actual operating reports for the properties, audited financial statements, tax returns, property appraisals, and engineering reports. These requirements were not mere technicalities, but provided information essential for a full and fair assessment of whether any requested loan would qualify for Fannie Mae financing.[5] It is undisputed that this additional information was never provided.

Having failed to file an application when he first dealt with Green,[6] Ring subsequently had multiple opportunities to submit

[4] Because the district court and the Eighth Circuit held that Ring failed to make a *prima facie* case, Ring's discussion of burden shifting and pretext under *McDonnell Douglas* is irrelevant.

[5] In his Petition, Ring points to purported "expert" testimony that the materials sent by Green of First Interstate to Marsh of Fannie Mae were an "application." However, whether the materials sent consisted of an application is not a proper subject of expert testimony. Moreover, it is undisputed that necessary financial materials were never submitted. No "expert" opinion can refute this undisputed fact.

[6] Green's letter to Marsh transmitting the "preliminary package" points out the folly of any claim by Ring that this constituted an application. The letter states: "Should you wish to proceed with an application on any or all of these properties, I will send you several more sets in our full submission." Pet. Apdx. at C-65-66. The transmittal letter to Marsh clearly was not intended to constitute an application and Ring understood that an application would require a "full submission." FNMA App. at 191, 455, 497-498.

an application: (1) when Fannie Mae directly invited him, in its December 4, 1989, correspondence with Senator Danforth, to submit a formal application; (2) when, a month later, in further correspondence with Senator Danforth dated January 23, 1990, Fannie Mae requested that Ring contact its personnel directly to facilitate the process; (3) after the August, 1990, status conference when Judge Cahill ordered him to file and Fannie Mae to consider an application; and (4) after a subsequent status conference at which Judge Cahill asked why he had not applied and Fannie Mae agreed to waive application fees. Despite all these opportunities, Ring still failed to apply.

Ring's failure to apply is established by both the pleadings and the uncontroverted evidence — including Ring's own testimony and documents. Ring testified that he did not apply; testified that he knew when he left Green's office that further action would be needed to actually complete an application; answered in an interrogatory that he did not apply; stated in a letter to Senator Danforth that no application had been submitted; and, in his Petition and Amended Complaint in *Ring I*, asked for an order from the court directing that he be permitted to file an application and that Fannie Mae be required to process that application, an order Judge Cahill issued and Ring ignored.

In light of the fundamental deficiencies in the preliminary materials submitted by Ring, the affirmance of summary judgment based on the failure to file an application is hardly a "rigid, mechanized, or ritualistic" analysis of *prima facie* requirements. Pet. at 13, citing *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 715, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403, 407 (1983), and *Ring I*, 984 F.2d at 927. To the contrary, the Eighth Circuit's holding reflects the only reasonable, practical application of those requirements to the particular circumstances of this case, including Mr. Ring's own contradictory, manipulative conduct.

Nothing in the Eighth Circuit's opinion (or the record) supports Ring's assertion that the court's holding was based on simply the failure to file a pre-printed Fannie Mae application form. As established by the undisputed facts, the real issue in this case is not whether Ring submitted a particular application form, but rather that, despite repeated opportunities, he never supplied the substantive information required as part of an application. Ring's first question frames an issue that simply is not raised by this case.

Finally, the Eighth Circuit's affirmance of summary judgment is entirely consistent with the decision of the Third Circuit in *E.E.O.C. v. Metal Service Co.*, 892 F.2d 341 (3rd Cir. 1990). There, defendant Metal Service had purportedly established an application process in which all job applications were to be submitted through a third party, Job Service. Both plaintiffs in *Metal Service* had submitted complete applications to Job Service. In holding that plaintiffs had met the application requirement of a *prima facie* case, the Third Circuit found that the plaintiffs had in fact satisfied Metal Service's "application process." *Id.* at 349. The facts here present a radically different picture. Despite asking to be permitted to do so, being given the opportunities by Fannie Mae to do so, and being directed by a district court to do so, it is undisputed that Ring repeatedly failed to satisfy Fannie Mae's application process.

In *Metal Service*, the Third Circuit also recognized that a "relaxation of the application element of the *prima facie* case is especially appropriate when the hiring process itself, rather than just the decision-making behind the process, is implicated in the discrimination claim or is otherwise suspect." *Id.* There has been and can be no contention that the application process itself is implicated by Ring's discrimination claim. Unlike the amorphous and sporadically followed job application process in *Metal Service*, the Fannie Mae application process is well-established and open, and involves published procedures and

underwriting standards. Moreover, Ring does not and cannot allege that other potential borrowers' loans were approved without complete applications, and that he was discriminated against because he was required to submit such an application. To the contrary, it is Ring who has repeatedly sought preferential treatment and then pursued a lawsuit when he did not receive the special treatment he desired.

The Eighth Circuit's holding is fully supported by the record and is fully consistent with decisions of this Court and the courts of appeals considering the requirements of a *prima facie* case of discrimination. The holding does not raise the issue posed in the first question presented by petitioner, and does not present any question justifying this Court's exercise of its discretionary jurisdiction.

II. THE COURT OF APPEALS CORRECTLY DECLINED TO APPLY THE FUTILITY DOCTRINE TO THIS CASE TO RELIEVE RING OF THE BURDEN OF PROVING THE APPLICATION REQUIREMENT OF A *PRIMA FACIE* CASE OF DISCRIMINATION.

The Eighth Circuit's affirmance of summary judgment is fully consistent with those decisions recognizing and applying the "futility" doctrine, which simply has no application to the facts of this case. As established by the record, including Ring's own words and actions, Ring did not believe and could not reasonably have believed that submitting a completed application was futile because of any allegedly discriminatory policy of Fannie Mae. Accordingly, there was no basis to apply the futility doctrine to relieve Ring of his obligation to prove that he applied for the multi-million dollar loans he was purportedly seeking.

The futility doctrine was first recognized in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). There, this Court held that

a plaintiff asserting a job discrimination claim under Title VII need not have actually applied for a job if, based on knowledge of a "consistently enforced discriminatory policy," plaintiff reasonably believed that formally applying would be futile. *Id.* at 365-66. In *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447 (4th Cir. 1990), the Fourth Circuit applied the futility doctrine to a claim of housing discrimination under 42 U.S.C. §§ 1981, 1982 and 42 U.S.C. §§ 3601-31. *Id.* at 1449. In *Pinchback*, the Fourth Circuit emphasized that application of the doctrine required evidence establishing that a plaintiff, who in fact qualified for the housing sought, actually and reasonably believed that submitting an application would be futile because of that plaintiff's knowledge of the defendant's established discriminatory practices.

The undisputed facts fall woefully short of those required to invoke the "futility" exception recognized in *Teamsters* and *Pinchback*. In addition to there being no evidence of discriminatory practices by Fannie Mae, the undisputed facts establish both (1) that Ring in fact did not conclude that submitting a completed application would be a futile gesture, as a result of any claimed discriminatory policy of Fannie Mae, and (2) that Ring could not reasonably have concluded that submitting an application would have been a futile gesture.

Ring's letters to Senator Danforth refute any claim that Ring believed an application was futile. Ring's letters specifically asked for assistance in requiring First Interstate and/or Fannie Mae to allow Ring to submit a loan application. Had Ring believed that submitting an application was a futile act, he surely would not have wasted his time asking a United States Senator to help him obtain that specific opportunity.

Moreover, the December, 1989, and January, 1990, letters sent by Fannie Mae to Senator Danforth further undermine Ring's "futility" argument. In those letters, Fannie Mae ex-

pressly invited Ring to submit an application and promised to process any application submitted. Contrary to Ring's efforts to distort the content of those letters, the letters did not state that Fannie Mae could not finance the properties. Although the letters candidly noted that the limited information Ring had provided raised questions about the condition of the properties and their eligibility for loans,[7] nothing in the letters foreclosed the possibility of approval if Ring submitted the information necessary for a complete application. Indeed, by identifying the questions concerning the condition of some of the properties, the letters implicitly invited Ring to provide additional information to resolve these concerns. He refused to do so.

Ring's "futility" argument is most dramatically undercut by his successful effort to obtain a judicial order requiring that his application be accepted and reviewed. *See supra* pp. 7-9. In response to Ring's request, Judge Cahill directed Ring to submit applications on those properties for which he wished to obtain loans and directed Fannie Mae to process any such applications in good faith. Fannie Mae Appendix to this Opposition at A-3. Judge Cahill's Order also required Fannie Mae to report back its evaluation of and decision on any application received. *Id.* Ring never applied. Ring now asks this Court to believe that, having asked for and obtained judicial intervention, he still chose not to submit an application on the grounds that it would be nothing more than a futile act.[8] After Judge Cahill's Order, as a matter of law, Ring could not have reasonably believed that submitting

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[7] These questions were definitively answered during discovery in the district court, which established that the loans Ring was allegedly seeking exceeded Fannie Mae's acceptable loan-to-value ratios. *See* Judge Hamilton's Memorandum and Order granting summary judgment, Pet. Apdx. at B-6.

[8] When Judge Cahill asked Ring why he had failed to follow the court's directive to file a completed application, Ring complained about the costs involved. He did not raise any issue of futility.

an application would have been a futile act, and Ring cannot now rely upon the futility doctrine as an excuse for failing to submit an application.

The futility doctrine simply has no relevance to the facts of this case. Ring did not fail to submit a complete application based on any reasonably held belief that it would be futile because of any claimed discriminatory policy of Fannie Mae. Rather, Ring did not apply because he knew that, as established by evidence obtained during discovery in the district court, his properties would not qualify for the loans he was seeking.

The Eighth Circuit affirmance of summary judgment in favor of defendants is entirely consistent with the decision of this Court in *Teamsters v. United States* and the decision of the Fourth Circuit in *Pinchback*. The Eighth Circuit, which has relaxed the application requirement when appropriate in discrimination cases, *e.g. Winbush v. State of Iowa by Glenwood State Hosp.*, 66 F.3d 1471 (8th Cir. 1995), and *Paxton v. Union National Bank*, 688 F.2d 552, 568 (8th Cir. 1982), correctly recognized that the futility doctrine had no application under the facts of this case.

CONCLUSION

The issue presented in this case is simply whether Ring has failed to present a *prima facie* case of discrimination under the Fair Housing Act. In the more than three years between the Eighth Circuit's opinion in *Ring I* and Judge Hamilton's granting of summary judgment, Ring was given every opportunity to develop a record supporting his pleaded claim of discrimination. He failed. In seeking reversal of the district court's judgment, Ring asked the Eighth Circuit to ignore not only defendants' undisputed evidence but also Ring's *own* documents and Ring's *own* testimony, all establishing that he never applied for a loan. The Eighth Circuit properly refused to do so.

In fact, the record before the Eighth Circuit established not that Ring was discriminated against, but rather that he had sought preferential treatment from Fannie Mae, just as he was seeking it from the Eighth Circuit, where he asked, without justification, to be relieved of his obligation of proving a *prima facie* case. Again, the Eighth Circuit properly refused to do so.

The Eighth Circuit correctly affirmed summary judgment in favor of Fannie Mae because Ring cannot prove the elements of a *prima facie* case of a violation of the Fair Housing Act. The petition for certiorari should be denied.

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